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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAY 09 2001

JAMES R. LARSEN, CLERK

SPOKANE, WASHINGTON DEPUTY

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 MICHAEL P. CAMPION on behalf of)
11 himself and all others similarly situated,)
12 Plaintiffs,)
13 v.)
14 CREDIT BUREAU SERVICES, INC.;)
15 DARLENE M. BRIGHT and JOHN DOE)
BRIGHT; THOMAS J. MILLER and)
16 JANE DOE MILLER; and)
17 NICHOLAS M. WARRICK and JANE)
DOE WARRICK,)
18 Defendants.)
19

NO. CS-99-0199-EFS

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
AMENDMENT OF THE ORDER ON
CLASS CERTIFICATION

20 Defendants, Credit Bureau Services, Bright, and Miller, by and through their
21 respective counsel, submit this Memorandum in support of their Motion to amend the
22 Court's Order on class certification.
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MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR AMENDMENT OF THE ORDER ON
CLASS CERTIFICATION: 1

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1 **I. PROCEDURAL BACKGROUND**

2 Plaintiff brought this action as a class action for state and federal law claims.
3 Cross-motions for summary judgment were heard. The Court found language in a
4 garnishment affidavit to be deceptive and therefore in violation of the Fair Debt
5 Collection Practices Act, the Washington Collection Agency Act, and the Washington
6 Consumer Protection Act.
7

8 Plaintiff moved for class certification. The Court denied certification as to a
9 class involving garnishment payments. The Court granted certification as to a class
10 consisting of consumers who received the garnishment affidavits.

11 The statute of limitations for the federal claims is one year. Therefore, the class
12 is composed of consumers who received the garnishment affidavit during the period of
13 July 13, 1998, to July 13, 1999.
14

15 The statute of limitations for the state law claims is four years. Therefore, the
16 class for state law claims includes the consumers who received garnishment affidavits
17 between July 13, 1995, and July 13, 1999. According to the deposition testimony of
18 Darlene Bright, there are approximately 250 to 300 debtors who received garnishment
19 affidavits in any given year. Therefore, an additional 750 to 900 class members would
20 be included if the state law claims are certified.
21

22 The Court's Order on class certification certified only the issues of whether the
23 affidavit language was deceptive, the debt was a consumer debt, whether the affidavits
24 were returned as undelivered, and whether the affidavits were sent within the
25 applicable statute of limitations. The Court did not certify issues of causation and
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1 damages. In a status conference held on April 13, 2001, plaintiff's counsel conceded
2 the inability to prove actual damages for the state law claims.

3 The Court asked the parties to file a proposed class certification notice. The
4 parties consulted and filed the proposed notice. It eliminated the state law claims and
5 retained the federal law claims.
6

7 Under the Fair Debt Collection Practices Act, damages in a class action are
8 fixed by statute. The plaintiff is entitled to recover actual damages and the class
9 members receive their proportionate share of the lesser of \$500,000 or one percent of
10 the net worth of the defendant.

11 The Washington Consumer Protection Act requires proof of causation and
12 actual damages. There is no provision for statutorily fixed damages.
13

14 **II. AMENDMENT UNDER FRCP 52(b) IS APPROPRIATE**

15 The parties have agreed on the record that there are no circumstances under
16 which the class members could prove actual damages under state law. Assuming a
17 class member could show that they received and relied upon the affidavit's language,
18 they must then prove that the language caused actual injury. Although the Court has
19 found that the affidavit mischaracterizes the calculations in the affidavit as "judgment
20 amounts," as opposed to amounts sought to be reduced to judgment, there is no
21 dispute that such amounts are fixed by the garnishment statutes. In other words, a
22 garnishee defendant could not prove that the amounts are incorrect or improper as
23 allowed costs in a garnishment proceeding. Therefore, there are no circumstances
24 under which they could prove causation and damages.
25
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1 The Court's Order on class certification assumes the class members could prove
2 causation and damages under the Washington Consumer Protection Act. Since the
3 parties have agreed that this is not possible, the Court's findings and conclusions
4 should be amended to reflect the inability to prove damages and therefore, the lack of
5 basis for class certification of the state law claims.
6

7 **III. CLASS NOTICE NOT APPROPRIATE**

8 The Court has requested briefing on whether class notice is necessary if it
9 denies certification of the state law claims. The defendants believe notice is
10 unnecessary. The Court has broad discretion on how it manages a class action under
11 FRCP 23(d). Applying the standards set forth in *Diaz v. Trust Territory of Pac.*
12 *Islands*, 876 F.2d 1401 (9th Cir. 1989), class notice would not be appropriate.
13

14 FRCP 23(d) is intended to give the Court great flexibility in the management of
15 a class action.

16 The power to modify a Rule 23(d) order will be
17 particularly useful in connection with such matters as re-
18 evaluating a decision as to the existence or non-existence
19 of a class action under Rule 23(c)(1), determining the
20 course of proceedings or prescribing measures to
21 facilitate the presentation of evidence under
22 Rule 23(d)(1), and imposing conditions on the
23 representatives or intervenors under Rule 23(d)(3).
24 However, any alteration or amendment of an outstanding
25 order that could have a significant effect on the action
26 may have to be brought to the attention of all members of
the class. Otherwise, class members may remain inactive
in reliance on the earlier determination by the court
where an action is advisable for the protection of their
rights. For example, a decision under Rule 23(d) to
eliminate the class action status of the proceeding or to
exclude certain persons who previously had been

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1 assumed to be members of the class, might work to the
2 disadvantage of absentees who may permit the statute of
3 limitations to run without protecting their individual
rights by instituting separate actions.

4 Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d* § 1791 at pp.
5 287, 288 (emphasis added).

6 Notice is neither appropriate nor necessary under these circumstances. The
7 Court has identified the following factors to determine if notice of pre-certification
8 dismissal is required: (1) whether the class allegations were frivolous “boilerplate”
9 claims asserted by the plaintiff in order to extract a more favorable settlement,
10 (2) whether the plaintiff has entered a settlement that would be objectionable to or
11 harm the absent class members, and (3) whether class members would suffer prejudice
12 by not knowing about the dismissal because they had refrained from filing suit in
13 reliance on the pending class action.

14 Defendants have filed the Affidavit of Jed W. Morris in support of this motion.
15 It states the following: (1) the parties have not agreed on any settlement of this case
16 and there are no settlement offers pending, and (2) the defendants have no knowledge
17 of notice to any putative class members which would potentially create prejudice
18 because they refrained from filing suit in reliance on the pending class action.
19 Applying the three-part test set out in the Court’s Order, there is no basis for
20 pre-certification notice.

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CLASS CERTIFICATION: 5

1 RESPECTFULLY SUBMITTED this 7th day of May, 2001.
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4 LUKINS & ANNIS, P.S.
5

6 By 
7

8 JED W. MORRIS
9 WSBA# 13832
10 Attorneys for Defendants, Credit
11 Bureau Services and Bright
12

13 By 
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15 TERRENCE W. CULLEN
16 WSBA# 12554
17 Attorney for Defendant Miller
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MEMORANDUM IN SUPPORT OF DEFENDANTS'
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 MICHAEL P. CAMPION on behalf of)
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16 BRIGHT; THOMAS J. MILLER and)
17 JANE DOE MILLER; and)
18 NICHOLAS M. WARRICK and JANE)
19 DOE WARRICK,)
Defendants.)

STATE OF WASHINGTON)
County of Spokane)

JED W. MORRIS, being first duly sworn upon oath, hereby deposes and says:

23
24 1. I am competent to testify to the matters contained herein and do so on
25 personal knowledge.

AFFIDAVIT OF JED W. MORRIS: 1

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2. I am the attorney for defendants, Credit Bureau Services and Bright.

3. There are no settlement offers pending and the parties have not entered into a settlement agreement.

4. I am not aware of any facts which would support the conclusion that putative class members received notice of this class action and relied upon it to their detriment. I know of no publicity or other communications which would have given notice of this class action to putative class members.

JED W. MORRIS

SUBSCRIBED AND SWORN to before me this 9 day of May, 2001.

(Seal or Stamp)



My appointment expires: 12-15-03

Notary Public

(Print Name)

My appointment expires: 12-15-03

AFFIDAVIT OF JED W. MORRIS: 2

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